

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1513

RICHARD J. TALSKY,

Petitioner,

v.

DEPARTMENT OF REGISTRATION AND EDUCATION,
STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE STATE RESPONDENT

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BRIEF IN OPPOSITION

RESPONDENT, DEPARTMENT OF REGISTRATION AND EDUCATION of the State of Illinois, respectfully prays that the petition for writ of certiorari filed by RICHARD J. TALSKY be denied.

OPINIONS BELOW

The decision of the Illinois Supreme Court is reported at 68 Ill. 2d 579, 370 N.E. 2d 173 (1977).

JURISDICTION

(omitted)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(See Supplement)

U.S. CONST., amend. I;
Ill. Rev. Stat., 1975, Ch. 91, § 16a.

QUESTIONS PRESENTED

1. Does the petitioner, Richard J. Talsky, have standing to challenge the constitutionality of the advertising restriction contained in Section 16a(13) of the Illinois Medical Practice Act?

2. Did the Illinois Supreme Court correctly interpret and apply the prior decision of this Court in *Bates v. State Bar of Arizona*?

STATEMENT OF THE CASE

Richard J. Talsky, a chiropractor licensed to practice in the State of Illinois, appeared before the Illinois Medical Examining Committee to answer charges that he engaged in advertising to solicit professional business in violation of Ill. Rev. Stat., 1975, Ch. 91, §§ 16a(4) and (13). The Illinois Medical Examining Committee found from the testimony and evidence presented that Dr. Talsky had used handbills, circulars, and newspaper advertisements to solicit professional business and, for the same purpose, had distributed business cards by affixing the same to the exterior of his office window so they could be removed by passers-by. The findings led the Committee to conclude that Dr. Talsky violated Ill. Rev. Stat., 1975, Ch. 91, §§ 16a(4) and (13) and resulted in a recommendation that the Director of the Department of Registration and Education suspend Dr. Talsky's license for ninety (90) days. After reviewing a Motion for Rehearing, the Director adopted the Findings of Fact, Conclusions of Law, and Recommendations to the Director of the Medical Examining Committee and ordered the license of Dr. Talsky suspended for ninety (90) days.

Dr. Talsky then filed a complaint for administrative review pursuant to the Illinois Administrative Review Act (Ill. Rev. Stat., 1975, Ch. 110, §§ 264, *et seq.*) and the Department of Registration and Education answered by filing the entire administrative record. The trial court stayed the suspension pending disposition on the merits.

The hearing before the trial court proceeded on Dr. Talsky's complaint for administrative review. By statute, the purpose of the judicial review was to determine whether the Department's decision was supported by the evidence

in the record and was in accordance with the law. The court's review was restricted to the evidence in the record. Ill. Rev. Stat., 1975, Ch. 110, § 274. The only evidence in the record was offered by the Department and comprised the various advertisements placed by Dr. Talsky.

Upon review of the record and consideration of the arguments, the trial court ruled that the advertising restrictions in the Illinois Medical Practice Act (Ill. Rev. Stat., 1975, Ch. 91, § 16a(13)) were unconstitutionally overbroad, vague, and indefinite. Upon motion of the Department of Registration and Education to reconsider and vacate, the trial court withdrew its finding that the advertising restrictions were unconstitutionally vague and indefinite, but declined to alter its conclusion that the scope of the restriction was unconstitutional.

Pursuant to Illinois Supreme Court Rule 302(a), the Department appealed directly to the Illinois Supreme Court. In a five to two decision, the Illinois Supreme Court reversed the trial court. The majority recognized that "under the authority of *Virginia Citizens* and *Bates*, we must conclude that the restrictions [in section 16(13)] are overly broad and may operate in some cases to suppress commercial speech in violation of the First Amendment," 68 Ill. 2d at 590, 370 N.E. 2d at 178; however, the majority reversed the trial court based on its conclusion that Dr. Talsky's advertisements were not entitled to First Amendment protection.

Dr. Talsky petitioned the Illinois Supreme Court for a rehearing. The petition was denied without opinion.

REASONS FOR DENYING WRIT

I.

THERE IS NO CONFLICT OF DECISION NOR ANY IMPORTANT QUESTION OF FEDERAL LAW.

There is no conflict between the decision of the Illinois Supreme Court and the prior decisions of this Court. In its decision, the Illinois court carefully considered the decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and applied the dictates of that decision to the case before it. The Court recognized that after *Bates*, the broad advertising restrictions in the Illinois Medical Practice Act were probably unconstitutional and recommended that the Illinois legislature reconsider the restrictions in light of current constitutional mandates. However, the Court declined to rule the restrictions unconstitutional because it found that the advertisements before it were not entitled to First Amendment protection within the purview of this Court's decisions in *Bates* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

Thus the Illinois decision is restricted to the nature of the particular advertisements before the Court and has no practical effect on other professionals who advertise in Illinois. It is safe to assume that the Illinois legislature will act on the recommendation of the Illinois Supreme Court to conform Illinois law with the dictates of this Court. The parameters of professional advertising in Illinois will be determined when the state legislature enacts legislation in light of the First Amendment status accorded commercial

speech. At that time Illinois courts, and ultimately this Court, will decide whether the scope of restrictions established by the legislature are constitutional.

The Illinois court gave no indication of what legislative restrictions on professional advertising would be permissible and, as a consequence, review of the Illinois decision will not serve to delineate the permissible scope of regulation. The decision therefore has no national or statewide significance nor does it affect litigants other than Dr. Talsky. The decision has no practical consequences beyond the determination that Dr. Talsky's advertisements were not entitled to First Amendment protection.

II.

THE DECISION BELOW IS CORRECT.

This Court often has recognized that a defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged. The Court consistently has permitted "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Bigelow v. Virginia*, 421 U.S. 809, 816 (1975).

The above represents a statement of the expanded standing provided litigants who allege a statute is overbroad in violation of the First Amendment. It also represents a departure from the traditional standing requirement that the activity at bar be constitutionally protected before a litigant can challenge the constitutionality of a statute on the ground that it is overbroad. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973); *Dombrowski v. Phister*, 380 U.S. 479, 486 (1965).

In *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977), this Court held that:

Since overbreadth has been described by this Court as 'strong medicine,' which 'has been employed . . . sparingly and only as a last resort,' *Broadrick v. Oklahoma*, 413 U.S., at 613, 93 S. Ct., at 2916, we decline to apply it to professional advertising a context where it is not necessary to further its intended objective. Cf. *Bigelow v. Virginia*, 421 U.S., at 817, 818, 95 S. Ct., at 2230.

The decision below is based on traditional standing requirements. To determine whether Dr. Talsky has standing, two questions must be considered. The first question is whether Dr. Talsky's advertisements are commercial speech. If they are, then pursuant to the holding in *Bates*, Dr. Talsky can challenge the statute only if his advertisements are protected speech. Assuming Dr. Talsky's advertisements to be commercial speech, the second question is whether they are entitled to the qualified First Amendment protection afforded such speech. If Dr. Talsky's advertisements are commercial speech and not within the scope of the qualified First Amendment protection set forth in *Bates*, then the decision below is correct.

To ascertain whether or not Dr. Talsky's advertisements are commercial speech requires a historical review of the commercial speech doctrine. Prior to 1975, the decision whether a particular expression was entitled to First Amendment protection depended on whether or not it was considered "commercial." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). The classification of speech as "commercial" stripped it of its First Amendment protection and resulted in a strong likelihood that the speech would be subject to regulation under the state's police power. *Head v. New Mexico Board*, 374 U.S. 424 (1963); *Williamson v.*

Lee Optical, 348 U.S. 483 (1955); *Breard v. Alexandria*, 341 U.S. 622 (1951); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935).

Because the classification "commercial" subjected broad categories of speech to prior restraints, the definition of commercial speech narrowed in almost every decision following *Chrestensen*. *Murdock v. Pennsylvania*, 319 U.S. 105 (1942); *Thomas v. Collins*, 323 U.S. 516 (1944); *New York Times v. Sullivan*, 376 U.S. 254 (1963); *Pittsburgh Press v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376 (1973); *Bigelow v. Virginia*, 421 U.S. 809 (1975). By the time the decision in *Bigelow* was rendered, serious doubt existed as to whether any speech could henceforth be categorized commercial. *Virginia Citizens*, 425 U.S. at 760.

The continuous limitations on the definition of commercial speech ended with the decision in *Virginia Citizens*. In that decision this Court formally overturned the commercial speech doctrine. The rationale for the abandonment of the doctrine was set forth most succinctly in Justice Stewart's concurring opinion:

Since the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought. Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decision-making. 425 U.S. at 780-781 (Stewart, J., concurring).

It was therefore a combination of the informational value of commercial speech and the existence of a method whereby the States could adequately protect the public welfare,

without totally suppressing commercial speech, that destroyed the commercial speech doctrine. To preserve the benefits of commercial speech while maintaining the states' power to insure that such speech retained its beneficial aspects, the decisions in *Virginia Citizens* and *Bates* balanced the informational value of commercial speech against the public interest in totally prohibiting such speech. The result was the extension of qualified First Amendment protection to commercial speech. In note 24 to the *Virginia Citizens* decision, Justice Blackmun stated:

In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly different from other forms. There are common-sense differences between speech that does no more than propose a commercial transaction, *Pittsburgh Press Co. v. Pittsburgh Comm's on Human Relations*, 413 U.S. at 385, and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. 425 U.S., at 771-772, n. 24.

This Court recognized that to extend the full panoply of First Amendment protection to professional advertising would make the regulation of such advertising ineffective. In his concurring opinion in *Virginia Citizens*, Chief Justice Burger noted:

I doubt that we know enough about evaluating the quality of medical and legal services to know which claims of superiority are 'misleading' and which are justifiable. Nor am I sure that even advertising the price of certain professional services is not inherently misleading since what the professional must do will vary greatly in individual cases. 425 U.S. at 775 (Burger, C. J., concurring).

The extension of qualified First Amendment protection to professional advertising thus strikes a delicate balance between the free flow of commercial information and the public interest in the maintenance of safeguards against deception and advertising abuses. However, that balance will not maintain its symmetry if the restrictive definition of commercial speech developed prior to *Virginia Citizens* continues to be applied. If this Court continues to use the concept of commercial speech that unfolded in *Bigelow*, commercial speech will flow freely, but not very cleanly.

The restrictive view of commercial speech was utilized to avoid the commercial speech doctrine and its drastic effect upon free expression. With the demise of the doctrine in *Virginia Citizens* there is no longer any reason to retain an overly restrictive concept of commercial speech. We therefore respectfully submit that the definition of commercial speech should be laid to rest with the doctrine that generated it.

The qualified First Amendment protection developed in *Virginia Citizens* and *Bates* should be the limit of the protection afforded professional advertising. Professional advertising can be defined as expression principally intended to propose or promote a commercial transaction. It can also be defined as a "commercial proposition directed toward the exchange of services rather than the exchange of ideas." See *Bigelow v. Virginia*, 421 U.S. 809, 831 (1975) (Rehnquist, J., dissenting). In the Illinois statute, advertising is included only if it is advertising "to solicit professional business." Ill. Rev. Stat., 1975, Ch. 91, § 16a(13).

In the instant case, Dr. Talsky's advertisements clearly propose or promote a commercial transaction and are principally directed toward the exchange of services rather than the exchange of ideas. The Illinois courts specifically

determined that his advertisements were designed to solicit professional business. They should therefore be entitled only to the qualified First Amendment protection outlined in *Virginia Citizens* and *Bates*. Extension of the full panoply of First Amendment safeguards to Dr. Talsky's advertisements would immunize them from the regulatory power of the state even though they are false, deceptive and misleading. *New York Times v. Sullivan*, 376 U.S. 254, 266 (1963). Such a result would negate the very beneficial aspects of professional advertising which initially led this court to extend it qualified First Amendment protection. Therefore, Dr. Talsky's advertisements are not entitled to unqualified First Amendment protection and he consequently has standing to challenge the Illinois statute only if his advertisements are not subject to the permissible limitations that may be imposed on advertising by physicians and chiropractors.

The precise outline of what limitations can constitutionally be imposed on professional advertising has not yet been drawn. However, in both *Bates* and *Virginia Citizens* this Court gave three examples of permissible restrictions that may be imposed on professional advertising. They are:

- (a) prohibitions on false, deceptive or misleading speech;
- (b) time, place and manner restrictions;
- and (c) prohibitions on advertising which promotes conduct which is illegal. 433 U.S. at 383-384; 425 U.S. at 771-772.

In both *Bates* and *Virginia Citizens*, the very first example of permissible limitations on advertising is the restraint of advertising that is false, deceptive or misleading. The decision of the Illinois Court can rest solely upon the conclusion that Dr. Talsky's advertisements are false, deceptive, and misleading.

There are two patently false and misleading themes running through Dr. Talsky's advertisements. The first theme is that all drug use is harmful and that most illnesses can be cured without drugs through chiropractics. Dr. Talsky advertises that: "health is in reach through chiropractics" and "elimination of the NEED for drugs is not a far fetched idea but an accomplished fact!!"

Chiropractors in Illinois cannot prescribe drugs, Ill. Rev. Stat., 1975, Ch. 91, § 5(2)(c), so it is not surprising that Dr. Talsky denigrates the use of drugs and urges drugless treatment of illnesses. However, assuming that some illnesses can be treated and cured by chiropractics without the use of drugs, the assertions that chiropractic care will eliminate the need of drugs to cure illness in general and that chiropractic care is essential to good health in all cases, are both misleading and false.

The second theme is that people will live happy healthy lives only if they receive periodic chiropractic care. Dr. Talsky advertises: "If you feel as bad as you do now, how will you feel in 10, 20, 30 years from now? Can you afford to continue patching up symptoms when health is within reach through chiropractic care? IT'S NOT TRUE TO SAY . . . We are doing everything possible UNLESS CHIROPRACTICS IS INCLUDED." In another advertisement there are contrasting pictures of a healthy child and an obviously sick and starving child captioned "SADNESS TO SUNSHINE" and "SICKNESS TO HEALTH." The assertion is plainly that chiropractic care will insure good health.

The state of the medical arts today makes it impossible for any health professional to promise health and happiness. Conversely, it is patently false to suggest that one will be on his knees suffering because his child was born with a birth defect as a result of his failure to know about

chiropractic care. Dr. Talsky's advertisements, which promise that health and happiness result from chiropractic care and misery results if such care is ignored, are patently false and certainly misleading. They are therefore outside the zone of First Amendment protection. *Bates*, 433 U.S. at 383; *Virginia Citizens*, 425 U.S. at 771.

Dr. Talsky's advertisements are further removed from the zone of First Amendment protection by the nature of the profession involved and the context of the advertisements. Medical professionals, by definition, deal in an area where individuals are peculiarly susceptible to alluring promises of physical relief. *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 612 (1935). The irreparable damage that can be suffered by an individual who is misled by the advertisements of medical professionals serves to narrow the leeway permitted such professionals in advertising their services. *Bates*, 433 U.S. at 383. If puffery is ultimately condoned in some professional advertising, that condonation should not be extended to the advertisements of medical professionals. As this Court noted in *Bates*, different degrees of regulation may be appropriate in different areas. 433 U.S. at 383, n. 37. In the medical area, the danger of such advertising is that it may generate a demand for unneeded medical attention or may convince the unwitting that a particular type of medical treatment is called for to the exclusion of another type that may be needed.

The second factor that further removes Dr. Talsky's advertisements from the zone of First Amendment protection is the context in which it appears. Even if it could be argued that Dr. Talsky's statements might not be false and misleading, they appear in a context utilizing all of the hucksterism known to the advertising trade. Dr. Talsky utilizes testimonials from individuals ostensibly aided by

chiropractic care when fully licensed physicians were unable to help. Dr. Talsky engages in glittering generalities ("Sadness to Sunshine, Sickness to Health") and attempts to generate a bandwagon effect of individuals rushing to obtain chiropractic services. Dr. Talsky offers free chicken and free X-rays in an effort to generate demand for a particular type of health service. The context in which Dr. Talsky's various statements regarding the efficiency of chiropractic care removes any vestige of doubt that they are entitled to the protection of the First Amendment.

The decision of the Illinois court can also rest on the conclusion that Dr. Talsky's advertisements could have been prohibited by properly drawn restrictions on the time, place and manner of his advertisements. The court held that:

[I]t is further evident that the attachment of even protected advertising material to traffic-light posts, traffic-control boxes and United States mail boxes would constitute an improper time, place and manner for the advertising of professional services under those uses. 68 Ill. 2d at 594, 370 N.E. 2d at 180.

Prior decisions of this Court clearly evidence the accuracy of the Illinois court's conclusion. *Bates*, 433 U.S. at 383; *Virginia Citizens*, 425 U.S. at 771; *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

Whatever this Court ultimately determines to be the permissible scope of advertising that can be engaged in by medical professionals, it is beyond doubt that Dr. Talsky's advertisements are outside that scope and can be prohibited by state regulation. Therefore, the Illinois court's refusal to consider the constitutionality of the Illinois restrictions on advertising by physicians and chiropractors was correct. Dr. Talsky's advertisements are beyond the pale of First Amendment protection and he therefore has no standing to challenge the constitutionality of the Illinois statute.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SUPPLEMENT

SUPPLEMENT**CONSTITUTIONAL PROVISIONS INVOLVED**

First Amendment to the United States Constitution

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

STATE STATUTES INVOLVED

Ill. Rev Stat., 1975, Ch. 91, § 16a

The Department may revoke, suspend, place on probationary status, or take any other disciplinary action as the Department may deem proper with regard to the license, certificate, or state hospital permit of any person issued under this Act or under any other Act in this State to practice medicine, to practice the treatment of human ailments in any manner or to practice midwifery, or may refuse to grant a license, certificate, or state hospital permit under this Act or may grant a license, certificate, or state hospital permit on a probationary status subject to the limitations of the probation, and may cause any license or certificate which has been the subject of formal disciplinary procedure to be marked accordingly on the records of any county clerk upon any of the following grounds:

. . . .

4. Engaging in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud, or harm the public;

. . . .

13. Except as otherwise provided in Section 16a-1, advertising or soliciting, by himself or through another, by means of handbills, posters, circulars, stereoptican slides, motion pictures, radio, newspapers or in any other manner for professional business;